No. 595

In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

RUFUS WALLACE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States;

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on April 29, 1970, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the petitioner guilty of a violation of Title 26, United States Code, Section 4742(a), and sentencing him to the custody of the Attorney General of the United States for a period of six years.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on October 18, 1968, without opinion and is not reported. The order of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction of the District Court on Count III of the indictment and reversing the judgment of conviction on Counts IV and V was filed on April 29, 1970, No. 17308, and is not yet reported, but is set forth in Appendix A.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on April 29, 1970, and a timely petition for rehearing was denied on July 15, 1970. The jurisdiction of this Court is involved under Title 28, Section 1254(1), United States Code.

QUESTION PRESENTED

Where two counts of a three count indictment were ruled invalid by the Court of Appeals on the basis of this Court's opinion in *Leary* v. *United States*, 395 U.S. 6, should not petitioner's conviction on the third count be remanded for a new trial, in view of the fact that his substantial rights were prejudicially affected by the introduction of evidence to prove the invalid counts?

STATEMENT OF THE CASE

The petitioner was indicted along with one Dora Amos in a five count indictment which charged them with various violations of Title 26, United States Code, Section 4742(a) and Title 21, United States Code, Section 176(a). Prior to trial the trial judge granted the government's

motions to sever the defendant Dora Amos from the trial and to proceed only on Counts III, IV and V as to the petitioner (3A).[1]

Count III of the indictment charged the petitioner with a violation of Title 26, United States Code, Section 4742(a), in transferring 399.6 grams of marihuana not pursuant to a written order form issued by the Secretary of the Treasury of the United States on June 30, 1967. Count IV charged the petitioner with receiving, concealing and facilitating the transportation and concealment of the same marihuana referred to in Count III in violation of Title 21, United States Code, Section 176(a), while Count V charged him with receiving, concealing and facilitating the transportation and concealment of 2,593.2 grams of marihuana in violation of Title 21, United States Code, Section 176(a), on August 16, 1967.

Pretrial motions to dismiss Counts IV and V of the indictment were denied by the trial court (3A). However, the convictions on Counts IV and V of the indictment were reversed by the United States Court of Appeals for the Seventh Circuit on the basis of this Court's decision in *Leary* v. *United States*, 395 U.S. 6 (1969).

In order to demonstrate the prejudicial effect of the evidence admitted in support of Count V of the indictment, it is necessary to give a short summary of the evidence concerning not only the transaction which occurred on June 30, 1967 but also the transaction which occurred on August 16, 1967.

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[1] All record references are to documents filed in the United States Court of Appeals for the Seventh Circuit. "A" refers to petitioner's Appendix filed in that court.

At about 11:30 a.m. on June 30, 1967, federal narcotic agent Cloud called Dora Amos and told her that he wanted to buy a pound of marihuana (3B).[2] She told him that she would have to call her brother Rufus Wallace. When Agent Cloud called later, Dora Amos told him the petitioner was on his way with the marihuana and that it would cost $180.00 for a pound.

On the same day at about 12:30 p.m. Agent Kuksta observed the petitioner pull up in his automobile with two negro females and a small child. He saw the petitioner remove the two small paper bags and an electric fan from the auto trunk and enter the building where Dora Amos lived.

Another agent followed the petitioner and the others into the building and when he left at about 1:30 p.m., the petitioner was not carrying anything. Agent Cloud went to her apartment at about 1:45 p.m., and Dora Amos arrived at about 2:30 p.m. with another female carrying groceries (4B). She took Agent Cloud into the bedroom, removed two brown bags from a closet shelf and gave them to Agent Cloud for which he gave her $180.00. The bags contained marihuana.

On August 14, 1967, Agent Cloud again called Dora Amos and told her that he wanted to buy three pounds of marihuana. She told him that she didn't have it and she would have to call the petitioner.

The next day Agent Cloud dialed Dora Amos' telephone number, and the petitioner answered the phone. He agreed to sell the agent 3 pounds for $165.00 per pound. Later that night the petitioner told Cloud he

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[2] "B" refers to petitioner's Brief filed in the Court of Appeals.

could pick up the marihuana at Dora Amos' house at noon the next day. He also ordered another half pound for $90.00.

On the next day, August 16, 1967, the petitioner was observed carrying a large bag that was torn at the top into the building where Dora Amos lived. Agent Cloud called her number and spoke with her and the petitioner.

The several surveilling agents in the area went into Dora Amos' apartment and placed her and the petitioner who was seated at the kitchen table, under arrest. In front of him was a large grocery bag which was torn at the top and which contained six smaller bags of marihuana (5B).

REASONS FOR GRANTING THE WRIT

Where two counts of a three count indictment were ruled invalid by the Court of Appeals on the basis of this Court's opinion in Leary v. United States, 395 U.S. 6, the petitioner's conviction on the third count should also be remanded for a new trial in view of the fact that petitioner's substantial rights were prejudicially affected by the introduction of evidence on the invalid counts. The decision of the Court below is in conflict with decisions of other circuits.

The sole question presented in this petition is whether the petitioner's right to receive a fair trial on the only valid count of the indictment was prejudicially affected by the introduction of evidence to prove the allegations of a count of an indictment which was held to be invalid as a result of this Court's opinion in *Leary* v. *United States*, 395 U.S. 6.

The opinion of the Court below is in conflict with a decision of the Eighth Circuit in a case involving a conviction under Section 5841, Title 26, United States Code, which was held to be invalid by this Court in *Haynes* v. *United States*, 390 U.S. 85, and Section 5851, Title 26, United States Code, which was not affected by this Court's ruling:

In that case, *De Pugh* v. *United States*, 401 F.2d 346, 352 (8th Cir. 1968), the Court stated:

> "We are not clairvoyant and cannot possibly ascertain the effect which the evidence produced in connection with the invalid counts of the indictment had on the jury's verdict, and certainly we cannot say with any fair assurance that the defendants' sub-

stantial rights were not affected, and, therefore, it is only proper that we remand for a new trial." 401 F.2d at page 352.

The opinion in the petitioner's case is also in conflict with a recent case of the Seventh Circuit, *United States* v. *Stevenson*, 409 F.2d 354 (7th Cir. 1969). In that case, the defendant was charged with narcotic violations in a three count indictment. He was convicted on all three counts and received concurrent sentences. The Court of Appeals held that the heroin that was the subject of Count III was seized unlawfully. In reversing the convictions on all three counts of the indictment, the Court stated:

> "Normally where the sentences are concurrent on several counts we sustain a conviction if valid on any of the counts. Here however we think it is highly probable that Stevenson was prejudiced under Counts I and II by the introduction of the evidence to prove Count III. We think, in fairness, the three convictions should be set aside." 409 F.2d at page 357.

The three cases relied upon by the Seventh Circuit in reaching its decision are distinguishable from the case at bar.

In *Mower* v. *United States*, 402 F.2d 982 (8th Cir. 1968), Count I of the indictment charged the defendant with having carried a submachine gun in interstate commerce without having registered it as required by 26 U.S.C. 5841 in violation of 26 U.S.C. § 5855 and 5861. Count II of this indictment charged the defendant with a violation of 26 U.S.C. § 5851 and 5861, by possessing the *same* submachine gun described in Count I. The conviction on Count I was reversed on the basis of this Court's decision in *Haynes* v. *United States*, *supra*, but the conviction on Count II was affirmed. However, unlike the case at bar,

since the *same* physical evidence was used to prove the allegations in both counts of the indictment (that is, the *same* submachine gun) the defendant could not have been prejudiced by the introduction of the evidence used by the Government in proving the allegations of Count I of the indictment.

In *United States* v. *Young*, 422 F.2d 302 (8th Cir. 1970), the defendant was given concurrent sentences after having been convicted on Counts I, II, III and VII of an indictment charging various marihuana violations. The conviction on Count II of the indictment was reversed on the basis of this court's decision in *Leary* v. *United States*, 395 U.S. 6. Although the indictment is not set forth in the court's opinion, it appears as though the marihuana that was the subject of Count II of the indictment was the *same* marihuana that was also the subject of a valid count of the indictment. See Footnote 1 on page 303 of the opinion:

> "Counts I and III of the indictment charged illegal transfer of marihuana not pursuant to a written order form in violation of 26 U.S.C. § 4742(a), the substantive acts occurring on December 6-7, 1966.
>
> Count II was related to the transaction of December 6, and charged a transfer of marihuana without having paid the tax imposed by 26 U.S.C. §4741(a) in violation of 26 U.S.C. § 4744(a) (1)."

Therefore, in the *Young* case, the introduction of the evidence pertaining to the reversed count of the indictment did not prejudice the defendant because it was the same marihuana that was properly admitted into evidence in support of one of the affirmed counts of the indictment.

Upon a retrial in the instant case, the 2,500 plus grams of marihuana that was introduced to prove the allegations of the invalid Count V of the indictment would not be admissible.

In *United States* v. *Hutul*, 416 F.2d 607, 616, n. 26 (7th Cir. 1969), the Seventh Circuit stated that the conviction in that case did not require a reversal since the identical sentences on each count were to be served concurrently. However, this reasoning is conflicting with this Court's recent decision in *Benton* v. *Maryland*, 395 U.S. 784 (1969), which held that there is no jurisdictional bar to the consideration of challenges to multiple convictions, even though concurrent sentences are imposed.

The prejudicial effect of the evidence pertaining to the invalid count was amplified by the Government's closing argument to the jury wherein references were made to the similarities of the transactions that occurred on June 30, 1967 (Counts III and IV) and August 16, 1967 (Count V).

> "Now, I want you to see the similarities between these conversations on the 14th (August) and the conversations on June 30th."
>
> * * *
>
> "Let's go to August 14th, 15th and 16th, because the similarity between these two transactions (June 30 and August 16) overwhelmingly convinces us that Rufus Wallace delivered the marihuana not only on the 16th but on the—."
>
> * * *
>
> "It should overwhelmingly convince you that Rufus Wallace delivered the marihuana on the 30th day of June and then on the 16th of August. The two phone calls that were made on the 14th of August set the sale up. Those are exactly similar to the calls that were made on the 30th day of June, only this time . . ." (13A).

Because of the large quantity of marihuana introduced in support of the reversed Count V of the indictment (over 2,500 grams) and the prosecutor's several references to the similarity of the transactions in Count III and Count V in his closing argument, the jury was undoubtedly influenced by the "spill over" of the evidence introduced in support of the allegations of Count V in determining his guilt or innocence as to Count III, all of which prejudiced the petitioner and prevented him from receiving the fair trial guaranteed by the Constitution of the United States. There is no question but that the jury was influenced by the evidence admitted in support of Count V in determining the guilt or innocence of the petitioner as to Count III, because the jury was in fact told by the prosecuting attorneys that they should consider the evidence pertaining to Count V in arriving at a guilty verdict on Count III of the indictment.

The Courts, beginning with this Court's decision in *Boyd* v. *United States*, 142 U.S. 450 (1892), have consistently reversed convictions on the grounds of prejudice where evidence of the commission of other crimes has been introduced, and in the case at bar the petitioner was unfairly prejudiced by the introduction of evidence of a crime involving the possession of over 2,500 grams of marihuana.

The evidence as to the petitioner's involvement in the transaction that is the subject of Count III of the indictment is largely circumstantial in nature. Had the jury not been influenced and prejudiced by the introduction of the 2,500 grams of marihuana in support of the allegations of Count V, it is very probable that a different result would have been reached. Due process requires that the petitioner be given the opportunity to have his

case determined by a jury untainted by the wrongful admission into evidence of such a great quantity of contraband.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, April 29, 1970

Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. JOHN S. HASTINGS, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 17308 *vs.*
RUFUS WALLACE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois.

ORDER

This court having considered the record in this case, as well as the briefs filed by the parties, and having heard oral argument by counsel for said parties and having taken the case under advisement for decision, the court is of the opinion that the judgment below should be affirmed in part and reversed in part. The defendant was convicted in three courts of an indictment charging narcotics violations, and was sentenced to six years imprisonment on each count, the sentences to run concurrently. The government concedes that counts IV and V, based on 21 U.S.C. §176(a), must be reversed on the basis of *Leary v. United States*, 395 U.S. 6 (1969). However, we are of the opinion that the conviction on count III, based on

26 U.S.C. §4742(a), was not tainted by the introduction of evidence on the other two counts and that defendant was not prejudiced thereby. Accordingly, since the sentence under each count was equal to and concurrent with the others, the six year sentence imposed on count III should be affirmed. Accord, *United States* v. *Hutul*, 416 F.2d 607, 616, n. 26 (7th Cir. 1969). See *United States* v. *Young*, ... F.2d ..... (8th Cir., No. 18905, March 3, 1970); *Mower* v. *United States*, 402 F.2d 982 (8th Cir., 1968).

It Is Therefore Ordered that the judgment of conviction on counts IV and V of the indictment be reversed and that the judgment of conviction on count III be affirmed.

The court expresses its appreciation to Mr. Jerome Rotenberg, a member of the Chicago, Illinois bar for his excellent services on appeal as court appointed counsel for defendant-appellant Rufus Wallace.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, July 15, 1970

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. JOHN S. HASTINGS, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RUFUS WALLACE, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17308

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.